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No. 88-1447

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WARD PETROLEUM CORPORATION, NOVA ENERGY CORPORATION, VERLAN W. HARRELL, L.O. WARD, RICHARD D. VEAL, RAYMOND DALE SHIPLEY, SMACK DAB, LTD., NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES E. KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, AND JAMES HASENBECK,

Petitioners

v.

THE LOUISIANA LAND AND EXPLORATION COMPANY, AS SUCCESSOR BY MERGER AND ACQUISITION TO INEXCO OIL COMPANY, THE OKLAHOMA CORPORATION COMMISSION (COMPOSED OF JAMES B. TOWNSEND, BOB HOPKINS, AND BOB ANTHONY), ROBERT H. HENRY AS ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, ROD W. YLITALO, MCFARLANE COMPANY, AND TRIMBLE PROPERTIES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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March 29, 1989

29 pp

RULE 28.1 STATEMENT

As required by Rule 28.1 of this Court, the corporate Respondent, The Louisiana Land and Exploration Company, lists the following parent companies, subsidiaries, or affiliates:

A. Respondent, The Louisiana Land and Exploration Company, has no parent corporation.

B. Following are the subsidiaries of such Respondent:

1. Candex Development Limited.
2. CL&E Corporation
3. HM Copper, Inc.
4. Inexco Oil Company
5. Inexco Mining Company
6. Wilson Brothers Drilling Company
7. Wilson Brothers Corporation
8. Jacintoport Corporation
9. Kaluakoi Corporation
10. Kaluakoi Lands, Ltd.
11. LL&E Alberta, Inc.
12. LL&E Canada, Ltd.
13. LL&E Columbia, Inc.
14. LL&E Egypt, Inc.
15. LL&E Espana, Inc.
16. LL&E (Europe-Africa-Middle East) Inc.
17. LL&E France, S.A.
18. LL&E Gas Marketing, Inc.
19. LL&E, Inc.
20. LL&E International, Inc.
21. LL&E Mining, Inc.
22. LL&E (Netherlands) Inc.
23. MaraLou Netherlands Partnership
24. CLAM Petroleum Company
25. LL&E Netherlands Petroleum Company
26. LL&E Overseas Petroleum, Ltd.
27. LL&E Petroleum Marketing, Inc.
28. LL&E Petroleum Terminals, Inc.

29. LL&E Petroleum Resources International, Inc.
30. LL&E Pipeline Corporation
31. LL&E Suez, Inc.
32. LL&E Tunisia, Inc.
33. LL&E (U.K.) Inc.
34. LLOXY Holdings, Inc.
35. LLOXY Production Financing Company, Inc.
36. Molokai California Limited
37. Sun Fire Coal Company
38. Warrior River Coal Company
39. White Pine Leasing, Inc.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

This matter comes before the Court on Petition of Ward Petroleum Corporation, et al. ("Petitioners") for Writ of Certiorari served upon The Louisiana Land and Exploration Company ("Respondent") on February 27, 1989. In opposition thereto, Respondent sets forth the pertinent facts, and controlling authorities, demonstrating that no reasons exist herein to grant the Petition.

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

I. The Oklahoma Oil And Gas Conservation Laws

The Petitioners have included in their Petition for a Writ of Certiorari a self-serving Statement of the Case which includes an unsupported statement of the rationale behind the Oil and Gas Conservation Laws of the State of Oklahoma. There is nothing in the record of this case to base such a statement upon, and it includes a number of inaccuracies, both factual and legal. Those errors found by the Respondent to be harmless are ignored herein. However, certain assertions of the Petitioners must be addressed.

In the Petitioners' geological dissertation, it is claimed that the Oklahoma Oil and Gas Conservation Laws dictate that "the unit is developed one well at a time." However, the valid creation of drilling and spacing units by the Oklahoma Corporation Commission depends upon a number of factors, only one of which relates to the ability of a well to drain from the geological reservoir. Drilling and spacing units are established within geological common sources of supply.[1] The initial order establishing a common source of supply creates a certain size of unit, generally varying from 2-1/2 acres to 640 acres, based upon a finding relating to whether oil or gas will be the predominant hydrocarbon produced, and prelimi-

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[1] Okla. Stat. Ann. tit. 52, Section 86.1(c) (1981) provides as follows:

The term "common sources of supply" shall comprise and include that area which is underlaid or which, from geological or other scientific data, or from drilling operations, or other evidence, appears to be underlaid, by a common accumulation of oil or gas or both; provided, that, if any such area is underlaid, or appears from geological or other scientific data, or from drilling operations, or other evidence, to be underlaid by more than one common accumulation of oil or gas or both, separated from each other by a strata of earth and not connected with each other, then such area, as to each said common accumulation of oil or gas, or both, shall be deemed a separate common source of supply.

nary expert estimate of the amount of acres to be drained by one well within the common source of supply.[2] It is generally recognized that drilling and spacing units in Oklahoma are prospectively created.[3] In other words, the drilling and spacing unit is established prior to the drilling, completion and analysis of the first unit well.[4]

If, after the common source of supply has been defined by the Oklahoma Corporation Commission, the drilling of wells establishes a need to enlarge or extend the common source of supply, the Oil and Gas Conservation Laws authorize an interested party to apply for an expansion of the boundaries thereof to include adjacent lands.[5] These extensions of the common source of supply are no longer subject to a finding as to the ability of a well to drain. The statute dictates that the drilling and spacing units covering the expanded area be of the same size and shape as

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[2] title 52, Section 87.1(c) provides that the following facts are material to creation of a drilling and spacing unit:

(1) The lands embraced in the actual or prospective common source of supply;

(2) The plan of well spacing then being employed or contemplated in said common source of supply;

(3) The depth at which production from said common source of supply has been or is expected to be found;

(4) The nature and character of the producing or prospective producing formation or formations;

(5) Any other relevant geological or scientific data.

[3] See Id., at Section 87.1(c) (1).

[4] This fact is implicitly recognized by the Oklahoma courts in decisions relating to the pooling authority granted under title 52, Section 87.1(e). In *Amoco Production Company v. Corporation Commission of Oklahoma*, 751 P.2d 203 (Okla.App. 1986) (Adopted by the Supreme Court of Oklahoma February 9, 1988), the Court found that original elections under pooling orders are sometimes based upon lack of information. The Court was unsympathetic to an owner who chose not to risk money in the unit well, but who, after discovering information generated at the expense of others in its drilling, wanted to participate in subsequent wells.

[5] title 52, Section 87.1(a)

nder the initial spacing order, unless certain facts re proven to justify otherwise.[6]

No matter the size of the drilling and spacing unit stablished within a common source of supply, the pacing order allows only one well to be drilled and roduced thereon. Each spacing order carries with it ne implication that the one authorized unit well will dequately develop the unit. Therefore, it is not nough to state simply that "under Oklahoma Law, he unit is developed one well at a time." A more ccurate statement is that until there has been a hange in the conditions assumed by the Oklahoma Corporation Commission to exist on the date a drilling and spacing unit is created, or until the knowledge of such conditions changes, the unit is to be developed by the one unit well.[7] As will be discussed more fully hereafter, this is the primary concept recognized by the Oklahoma Supreme Court in the decision appealed from by the Petitioners.

The "pooling application" referred to by the Petitioners is authorized by the Oil and Gas Conservation Laws of Oklahoma.[8] The Petitioners incorrectly imply that only the owners of oil and gas leasehold interests within a drilling and spacing unit may sponsor such application. Under Oklahoma law, any party

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[6] Id.

7 In fact, title 52, Section 87.1(c) specifically limits the density of well spacing by providing as follows:

> Subject to other provisions of this act, the order establishing such drilling and spacing unit shall direct that no more than one (1) well shall thereafter be produced from the common source of supply on any unit so established, and that the well permitted on that unit shall be drilled at the location thereon as prescribed by the Commission, . . .

[8] Title 52, Section 87.1(e) states that when two or more owners within a drilling unit have not agreed to pool their interests and a unit well has been proposed, or drilled, the Corporation Commission of Oklahoma shall "upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit."

owning *a right to drill* within the drilling and spacing unit, a phrase which would include unleased mineral owners, can apply for a pooling order. The Petitioners also incorrectly state that the pooling application "identifies the location of a proposed well within the unit. . ." Neither the Oil and Gas Conservation Laws, nor the Rules of the Corporation Commission of Oklahoma, require that a well location be specified within the application.[9] As a practical matter, applications for pooling never mention location. More importantly, the application in Cause CD No. 108567, the cause which resulted in the original pooling order in controversy in this case, did not specify any location for the unit well.

The Petitioners erroneously assert that an owner who elects not to participate[10] in the risk and expense of drilling the unit well is electing "not to share in any resulting revenues." The Oklahoma Corporation Commission is authorized to enter pooling orders only upon terms which are just and reasonable.[11] The pooling orders of the Commission have evolved into instruments which offer alternatives to participation in the risk of drilling the unit well. Those alternatives generally include either

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[9] See title 52, 87.1(e). The Rules of Practice of the Oklahoma Corporation Commission require only that the pooling application identify the applicant; provide the legal description of the drilling and spacing unit; list the case number assigned to the application; provide the name and address of each respondent; allege certain jurisdictional facts; cite the legal authority for Commission jurisdiction of the matter; state that the applicant cannot reach agreement with the respondents; and, identify the proposed unit operator. See Oklahoma Corporation Commission Rules of Practice, Rule Nos. 8-1 and 8-3.

[10] The Petition continually uses the phrases "opt out" and "opt in" and gives the impression that these are technical terms of art. Pooling orders of the Oklahoma Corporation do not use such terms, but simply require that owners elect either to particpate in the costs of drilling the unit well, or take compensation in lieu thereof. See Ex. 32; R. 142, 117.

[11] title 52, Section 87.1(e).

cash bonus and royalty interest; or no cash but an increased royalty interest. In either event, the party electing such alternatives will continue to share in revenues. Admittedly, the extent of sharing will depend upon the alternative selected, and will be less than the share realized by participating parties. However, the parties' reduced share results from their desire not to assume the financial risks taken by the participating owners.

The Petitioners make a very misleading statement by equating the process of obtaining authority to drill a second well upon a drilling and spacing unit, to seeking a "second forced pooling order." There is simply no connection between an application for an additional well, and an unauthorized attempt to obtain a second pooling order covering a drilling and spacing unit which is already subject to a valid pooling order.[12]

The Petitioners raise in their Statement of the Case what is identified as a key question. The Petitioners ask whether the election not to participate in the risk and expense of the unit well results in a relinquishment of the right to participate in any future development. This Court does not have jurisdiction to respond to the question. The answer was given by the Oklahoma Supreme Court in *Inexco Oil Co. v. Corporation Commission of Oklahoma*,___ P.2d ___, 59 Okla. B.J. 1978 (July 6, 1988), and is no longer open to discussion. The answer was the product of construction of state law by that court. That fact alone dictates denial of this Petition for Certiorari.

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[12] Authority to drill an additional well upon a drilling and spacing unit comes from title 52,Section 87.1(b) and (d). Those portions of the statute are unrelated to the authority for pooling found in title 52, Section 87.1(e).

II. The Original Pooling Order Covering The Drilling And Spacing Unit, And The Improper Attempt Of The Oklahoma Corporation Commission To Enter A Second Pooling Order.

In the portion of the Petitioners' Statement of the Case relating to the pooling orders in controversy, the Petitioners state that at the time the drilling and spacing unit in question was created information was available to suggest "the presence of much oil and gas in this unit." To the contrary, there were no wells on the unit at that time, and only by taking the financial risks associated with drilling could parties generate such information.[13]

There is nothing in the record to suggest that "the owners of oil and gas interests discussed the optimal location" of the unit well. The record reflects only a discussion between Inexco Oil Company and Ward Petroleum Corporation.[14]

Inexco Oil Company, the predecessor of The Louisiana Land and Exploration Company, filed an original pooling application with the Oklahoma Corporation Commission covering Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma. That tract was a 640-acre drilling and spacing unit for a number of separate and distinct common sources of supply previously established by the Oklahoma Corporation Commission. The common sources of supply covered were the Des Moines, Tonkawa, Cottage Grove, Atoka, Morrow, Springer, Cleveland and Marchand. Each common source of supply represented a separate and distinct accumulation of hydrocarbons thought to exist beneath Section 23. The Petitioners incorrectly state that Inexco sought to pool "the Red

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[13] See *Amoco Production Company v. Corporation Commission of Oklahoma*, 751 P.2d at 207.

[14] R. 57.

Fork member of the Des Moines common source of supply." The pooling application of Inexco, and the order which resulted therefrom, do not even mention the term "Red Fork."

Order No. 260474, the only valid and final pooling order covering Section 23, designated Inexco Oil Company as unit operator. A party who chose to participate in the risk of the unit well was required to pay to Inexco that party's share of the cost of such operation. The order's reference to the unit well was appropriate given the fact that only one unit well was authorized. The Oklahoma Corporation Commission could hardly require that participating owners pay to Inexco monies associated with wells which might be necessary in the future.

The Petitioners incorrectly state that an owner who elected not to participate in the unit well surrendered to Inexco that owner's oil and gas interests. Such owner did relinquish its right to participate in any subsequent well, and did relinquish the working interest[15] associated with its oil and gas interest. However, in exchange, the owner received either a cash bonus and a royalty interest, or no cash but an increased royalty interest or overriding royalty interest.[16] The reduction in revenue interest results

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[15] The term "working interest" is defined in H. Williams and C. Meyers, *Oil and Gas Terms* (7th Ed. 1987) as "the operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land." As noted therein:

> In the simple situation of a lessor who executes a lease, reserving 1/8th royalty, to a lessee who creates no burden on his estate, the working interest consists of 7/8ths of production subject to all costs of exploration and development.

[16] In *Meeker v. Ambassador Co.*, 308 F.2d 875, 882 (10th Cir. 1962), *Rev'd* 375 U.S. 160 (1960), rehearing denied 375 U.S. 989 (1964), the following definition was offered:

> An overriding royalty is a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor, free of any expense for exploration, drilling, development, operating, marketing and other

from the non-participating owner's decision not to take the risk of drilling.

The Petitioners quote from Paragraphs 2.c and 4 of Order No. 260474, emphasizing the inclusion of the word "well" in those provisions. Of course, as noted above, on the date of that order only one well was authorized to be drilled in Section 23. More importantly, the Respondent notes that the Petitioners' emphasis on this aspect of the order, when considered against the Oklahoma Supreme Court's construction of same, illustrates the defect existing in this appeal.

The Petitioners again assert that the Petitioners "had differed sharply" with Inexco over location of the unit well. There is no evidence of record that any party, other than Ward Petroleum Corporation, disagreed with the location of the unit well. Moreover, it is preposterous to claim that the Petitioners elected out of the unit well based on a belief that a second well would be drilled. To begin with, the record is devoid of any testimony to support such a statement. Secondly, an additional well within a drilling and spacing unit can only be drilled upon authority from the Oklahoma Corporation Commission. That authority is given only upon proof that the unit well cannot adequately develop the drilling and spacing unit. As such, it would have been purely speculative to conclude a second well would ever be authorized, let alone drilled.

The Petitioners wrongfully attempt to inject into this appeal information which is outside the record of the case below. The reference to the drilling of the "Albright well" and the results of such well are unsupported by the record. From the statements

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costs incident to the production and sale of oil and gas produced from the lease. It is an interest carved out of the lessee's share of the oil and gas, ordinarily called the working interest, as distinguished from the owner's reserved royalty interest.

made, it would appear that such well was drilled long after the cause was tried at the Oklahoma Corporation Commission, and the appeal to the Oklahoma Supreme Court commenced. There is no justification, either factually or ethically, for including unsubstantiated figures relating to revenues for that well. The Respondent has never had any opportunity to contest such figures, or to submit facts in opposition thereto.

SUMMARY OF ARGUMENT

I. The Issues Presented For Consideration By The Petitioners Do Not Raise Federal Questions.

A) The facts in the record of this cause illustrate that the decision of the Oklahoma Supreme Court does not raise the issue of a taking of private property in violation of the Fifth Amendment.

1) The question relating to whether the Oklahoma Supreme Court unlawfully took Petitioners' property depends upon an assumption that there existed property to be taken.

2) The decision of the Oklahoma Supreme Court, premised upon a construction of state statutes, determined that Petitioners did not own the property interest assertedly taken, same having been previously relinquished to the Respondent.

3) Therefore, the effect of Petitioners' request in the Petition is a plea to this Court to review the construction of state statutes performed by the Oklahoma Supreme Court.

4) This Court has no jurisdiction to review the decision of a state supreme court regarding state law, and the writ should be denied.

B) The record of this case reveals that the Petitioners were not deprived of due process rights guaranteed by the Fourteenth Amendment.

1) The property rights relinquished by the Petitioners were transferred to the Respondent under the original pooling order.

2) Petitioners do not claim that the original pooling order was deficient. A claim that such order was not preceded by notice and an opportunity to be heard would be necessary to establish a due process violation. Such a claim is not made.

3) The failure of the Petitioners to appeal the original pooling order permanently foreclosed their ability to attack the effect of such order upon their oil and gas property interest.

4) This appeal is a continued attempt to collaterally attack the original pooling order.

C) The decision of the Oklahoma Supreme Court does not retroactively divest Petitioners of vested rights.

1) The Oklahoma Supreme Court did not change the original pooling order.

2) The construction of the original pooling order by that Court coincides with its construction of state law.

3) The construction of state law by that Court was foreseeable.

4) A party electing in response to the original pooling order was on notice of the potential construction of state law so as to yield unit pooling.

ARGUMENT

This Court should deny the Petition for Writ of Certiorari filed herein. The ruling of the Oklahoma Supreme Court does not decide a federal question. Obviously, such ruling does not conflict with decisions of another state court of last resort, or of a federal court of appeals. Finally, the ruling does not decide a federal question in a way in conflict with applicable decisions of this Court.

The opinion of the Oklahoma Supreme Court depends upon such Court's construction of state oil and gas conservation laws. The Petition asks that this Court overturn that ruling. To do so, this Court must disagree with the construction of state law made by the court of last resort in Oklahoma.

The assertion of an unconstitutional taking is a veiled attempt to avoid the long standing position of this Court that state courts are allowed to decide state questions. The decision of the Oklahoma Supreme Court was that the oil and gas conservation laws of Oklahoma authorize only unit poolings. Under unit poolings the election not to participate in the risk of the unit well results in an assignment of the right of further participation. That assignment carries with it the working interest associated with the non-participants' oil and gas rights.[17] It is that bundle of rights which the Petitioners claim to have had taken by the Oklahoma Supreme Court. Petitioners were possessed of those rights only if the original pooling order was limited in scope to the wellbore of the unit well.

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[17] *Amoco Production Company v. Corporation Commission*, 751 P.2d at 206-207. See also *Ranola Oil Co. v. Corporation Commission*, 752 P.2d 1116, 1119 (Okl. 1988)

PROPOSITION I.

THE DECISION OF THE OKLAHOMA SUPREME COURT DID NOT RESULT IN AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY OWNED BY THE PETITIONERS.

The Respondent does not disagree with the Petitioners' assertion that an oil and gas leasehold interest is private property which, if taken by virtue of governmental action, entitles the owner to just compensation for its value. Each of the cases cited by the Petitioners refers to the general principles of law which apply to a Fifth Amendment taking. See also Sax, *Taking and the Police Power*, 74 Yale L.J. 36, 37 (1964). What the Petitioners fail to recognize is that the Court in those cases was not asked to rule on the issue of whether there existed any property to be taken.

The issue in *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295 (1976) concerned the question of the taking of a leasehold interest, the existence of which was not disputed. The Court held that a taking of such interest is compensable. In *Agins v. Tiburon*, 447 U.S. 255 (1980) the question related to the right of compensation where actions of the government result in inverse condemnation. There was not raised any question relating to ownership of the property seized. Analysis of the other cases cited yields the same result. The Court was considering the compensability of a taking, not the question of what interest was involved.

In this case, the Petitioners did not own the property claimed to have been taken. The Petitioners' oil and gas interests were made subject to the pooling application which resulted in the original pooling order. Notice of the hearing on that application was given to the Petitioners, and they were represented by counsel at the hearing. The Petitioners have never asserted a lack of notice of the origi-

nal hearing. The original pooling order provided the Petitioners with fifteen (15) days within which to elect as to their oil and gas interest.[18] The Petitioners elected not to take the risk of drilling the unit well, and accepted alternative compensation.[19]

The Petitioners claim that in electing not to share with Respondent the risk of drilling the unit well they relinquished rights only in the wellbore of that well. Accordingly, the argument continues with an assertion that working interest rights outside of that wellbore were retained. It is those rights purportedly retained which Petitioners argue were taken by the Oklahoma Supreme Court, and upon which this Petition centers. However, those rights were long ago relinquished to the Respondent and did not exist in Petitioners after the expiration of the election period provided in the original pooling order.

The Oklahoma Supreme Court, in the decision appealed from, stated as follows:

> "The Hearing Officer found Order No. 260474 force pooled the well-bore, not the unit. This clearly was erroneous. The order force pooled the entire unit, not just the well-bore. *Amoco Production Co. v. Corporation Commission,* 751 P.2d 203, 206 (Okl.Ct.App. 1986) (adopted by the Supreme Court February 9, 1988). Order No. 260474 required Ward and Vierson (sic), Nova's predecessor in interest, to participate in the costs of drilling and completing the Wolfe #1-23 or accept a bonus in lieu of participation. Ward and Vierson (sic) elected to accept a bonus. *Once the election period passed, the property interest of the affected parties vested. Ranola Oil Co. v. Corporation Commis-*

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[18] See Ex. 32; R. 142, 117.

[19] See R. 51, 52, 65.

> *sion,* 752 P.2d 1116, 1119 (Okl. 1988). Once vested, the property rights of the parties were beyond the reach of the Commission's power to modify. Id.; *Crest Resources v. Corporation Commission,* 617 P.2d 215, 218 (Okl. 1980). *By accepting the bonus, Ward assigned its exploratory rights to Inexco,* the operator, and can assert no right to participate in the subsequent increased density well. Similarly, Nova, as Vierson's (sic) successor in interset (sic), can assert no right to participate in the subsequent increased density wells. *Ranola,* 752 P.2d at 1119. Once the bonus was paid, Inexco's property rights vested." Id. (Emphasis added.)

The Petitioners skirt the problem inherent in the Petition by stating that because the Petitioners thought that rights were being retained under the original pooling order, those rights were retained. The Petitioners argue that the original order was written as a well-bore order and only later changed by the Oklahoma Supreme Court into a unit order. Nothing could be further from the truth. The Oklahoma Supreme Court in the decision appealed from obviously found that the original order was always a unit order. The opinion quotes that part of the original order which specifically provides for pooling "as a unit. . ."[20]

In arguing to the Oklahoma Supreme Court, the Petitioners fully briefed their contentions that the original pooling order was intended as a well-bore order. Those arguments were rejected, and the Oklahoma Supreme Court has construed the order to be unit in scope based upon Oklahoma Law.

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[20] The orignal pooling order is replete with reference to Inexco's intent for the development of the entire unit, and closely follows the statutory language of title 52, Section 87.1(e). See Ex. 32; R. 142, 117.

The Oklahoma Supreme Court ruling, based upon construction of Oklahoma Statutory Law, is not subject to review in this Court. A decision of a state Supreme Court is binding upon this Court insofar as state law is concerned. *Williams v. Kaiser,* 323 U.S. 471 (1945). See also *Kingsley Intern. Pictures Corp. v. Regents of University of State of New York,* 360 U.S. 684 (1959).

PROPOSITION II.

THE WRIT SHOULD BE DENIED BECAUSE THE PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO PROCEDURAL DUE PROCESS BY VIRTUE OF MISLEADING NOTICE.

As decided by the Oklahoma Supreme Court, the relinquishment of Petitioners' property rights took place upon expiration of the election period provided in the original pooling order. That order was issued after notice and a hearing upon the application of Inexco Oil Company. The Petitioners were given notice of that hearing and were represented by counsel at the hearing.[21] The Petitioners did not appeal the original order, and it became final. Inexco Oil Company was designated as operator of the drilling and spacing unit and the common sources of supply described in said order.

The record establishes that the Petitioners have never requested an amendment of the original order to remove Inexco as operator, or limit the scope of rights covered thereby. No party ever presented, or attempted to present, testimony which would support the requisite change in knowledge of condition upon which such amendment could be based. Without that evidence, the Oklahoma Corporation Commission was powerless to amend the order. *Marlin Oil Corpo-*

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[21] See Ex. 32; R. 142, 117.

ration v. Corporation Commission, 569 P.2d 961 (Okl. 1977). If the Petitioners felt there was effected a deprivation of rights by the original pooling order, it was incumbent upon the Petitioners to appeal that order and prevent it from becoming final. *Nilsen v. Ports of Call Oil Co.,* 711 P.2d 98, 102 (Okl. 1985).

The Petitioners cite a number of cases as authority in support of their procedural due process argument. A review of those cases, when applied to the facts presented in this matter, do not support granting the writ.

In *Lambert v. California,* 355 U.S. 225 (1957), the Appellant had no actual knowledge of a duty to comply with a legislative act. The well known ruling in *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306 (1950) provided that notice by publication is insufficient when actual notice can be accomplished using reasonable means. In *Peralta v. Heights Medical Center, Inc.,* 108 S.Ct. 896 (1988), the Appellant was improperly served and had no notice of a hearing on a guarantee of an employee's debt. In *Zauderer v. Office of Disciplinary Counsel of The Supreme Court of Ohio,* 471 U.S. 626 (1985), this Court upheld an order disciplining an attorney in spite of a claim that the theory relied upon for the censure was different than that originally noticed. The Court said it was enough if he was put on notice of charges and given an opportunity to appear and respond to same. Finally, in *Morgan v. United States,* 304 U.S. 1 (1934), the Court found that the notice of hearing before an administrative agency was too general and broad to apprise the parties what would occur at the hearing, and to allow preparation of a response.

The Petitioners herein were given notice of the hearing which led to the original pooling order. They do not contest such fact. The Petitioners were given an opportunity to appear for that hearing, and present their views. They did appear and present

their views. The Petitioners do not claim that the notice of hearing was too broad or general. Obviously, there is no lack of procedural due process. Nonetheless, the Petitioners pursue this appeal claiming the original pooling order, issued after notice and hearing, was the misleading instrument of notice.

The Petitioners do not argue that the original pooling order was ambiguous. They argue that it was clearly limited so as to be well-bore in scope. In their opinion, this is so because the Petitioners found the presence of the word "well" in the order. The Petitioners purportedly relied upon their personal construction of the language of the order as "notice" of the order's "intent," in making their decision not to participate. Thereafter, when the Oklahoma Supreme Court ruled the order to be unit in scope the Petitioners argue they were unconstitutionally misled, and cite *Butland v. Bowen*, 673 F.Supp. 638 (D. Mass. 1987) as precedent.

In *Butland*, supra, the District Court was reviewing a notice which denied a social security claim, but which *falsely* notified the claimant that she could file for reconsideration "at any time". In fact, she was required by written regulation to do so within four (4) years. The District Court found that the claimant reading such notice might wrongfully abandon a claim based upon its misleading content.

In this case, there can be no contention that the original pooling order contained a false representation of the effect of written statutes or regulations. As noted in *Amoco Production Co. v. Corporation Commission*, 751 P.2d 203, 206 (Okl.Ct.App. 1986) (Adopted by the Supreme Court February 9, 1988), a complete reading of title 52, Section 87.1(e) shows that it has always required unit pooling. Therefore, the fact that the original pooling order was construed to be a unit order illustrates that it complied with the statute.

Any reliance upon a different personal interpretation was misplaced. The construction of the statute by the Oklahoma courts was clearly foreseeable.

The Petitioners attempt to establish the Statement of Policy No. 45 issued by the Oklahoma Corporation Commission[22] as misleading notice upon which they relied to their detriment. However, the Supreme Court of Oklahoma has approved condemnation of the action of the Corporation Commission in its implementation of that policy statement. In *Amoco Production Company v. Corporation Commission of the State of Oklahoma and Samedan Oil Corporation,* 752 P.2d 835, (Okl.Ct.App. 1987), the Court found that the policy was an arbitrary and erroneous interpretation of the pooling statute.

PROPOSITION III.

THE OKLAHOMA SUPREME COURT PROPERLY EXERCISED ITS SUPREME POWER IN INTERPRETING STATE LAW, AND ITS CONSTRUCTION OF THOSE LAWS WAS FORESEEABLE.

The Petitioners claim that the decision of the Oklahoma Supreme Court changed the original pooling order, and in so doing retroactively interfered with vested rights owned by the Petitioners. This is an ironic assertion, given the fact that the Oklahoma Supreme Court specifically found that the Oklahoma Corporation Commission was attempting to change the order from unit to wellbore and thereby divest respondents of vested rights. Over and above such irony, the claim is groundless.

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930), this Court ruled that state courts have supreme power to interpret written laws of the

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state. The power of the United States Supreme Court to review decisions of state courts was expressly limited to decisions on federal questions. It is not enough if the state court rendered an erroneous decision on a question of state law, *or overruled principles established by previous decisions on which the appellant may have relied.* Those facts alone will not confer appellate jurisdiction on the United State Supreme Court.

Although involving a criminal statute, the case of *Bouie v. Columbia,* 378 U.S. 347 (1964) has relevance to this cause. In that case, the Court found that the construction of a criminal statute by a state Supreme Court was "unforeseeable", and as such, when applied retroactively to subject a person to criminal liability for past actions, the effect was to deprive that person of due process of law. This deprivation resulted from the fact that the Court found that the statute gave the person "no warning" that it could be construed to include the offense for which he was convicted.

There can be no valid argument made that the oil and gas conservation statute of Oklahoma was not susceptible to the construction given it by the Oklahoma Supreme Court.[23] The wording of the statute clearly refers to the development of the drilling and spacing unit, and would put any party on notice, or warning, that it could be construed as being unit in scope.

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[23]In *Amoco Production Company v. Corporation Commission of Oklahoma,* 751 P.2d at 205, the Court expressly found that the provisions of title 52, Section 87.1(e) clearly and unambiguously authorized only unit pooling.

RELIEF REQUESTED AND CONCLUSION

In view of the foregoing, further review of this action is unwarranted. This Court has no jurisdiction to review the decision of the Oklahoma Supreme Court which construed a state statute. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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